

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 29 January 2007

**Public Authority:** Charity Commission  
**Address:** 3<sup>rd</sup> & 4<sup>th</sup> Floor  
12 Princess Dock  
Princes Parade  
Liverpool  
L3 1DE

### Summary

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The complainant asked the public authority for information relating to correspondence between the Commissioners and Trustees. The public authority withheld it under section 42 of the Freedom of Information Act 2000 claiming legal professional privilege and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Commissioner did not uphold the complaint but noted that the public authority had not met the obligations placed upon it by section 17.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. On 29 July 2005 the complainant made the following request: *"I require copies of correspondence between the Commissioners and the Trustees, or Clerk to the Trustees, between the 22<sup>nd</sup> June 2004 and 21<sup>st</sup> September 2004, both dates inclusive, concerning the three resolutions that were signed by the trustees on 22<sup>nd</sup> June 2004. I also require copies of any notes of conversations between the above parties relating to the same subject'.*
3. On 25 August 2005 the public authority responded disclosing some of the requested information. It declined to disclose the remainder relying upon the sections 21 (information accessible by other means) for some of the information and 42 (legal professional privilege) for the remainder.

4. On 12 October 2005 the complainant contacted the public authority. He disagreed with the public authority's refusal notice and requested the information again.
5. On 19 October 2005 the public authority responded, upholding its original refusal to disclose the information upon the same grounds.

## The Investigation

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### Scope of the case

6. On 21 October 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following point:
  - that withholding the requested information was contrary to the provisions of the Act and as the 20 working days had passed he wanted the Commissioner to investigate and try and get a copy of the document.
7. In this particular case the public authority has claimed that a letter sent by Trustees to solicitors and the solicitors' response, were both covered by the section 42 exemption. The Trustees subsequently asked the public authority for advice and supplied it with both the initial letter to the solicitors and the solicitors' response.
8. Although the public authority also cited the section 21 exemption, the complainant has not complained about this therefore it will not be considered in this decision.

### Chronology

9. On 1 September 2006 the Commissioner contacted the public authority and asked it to explain and justify its use of the section 42 exemption, including relevant public interest arguments.
10. On 2 October 2006 the public authority responded enclosing the exempt information. It provided an argument in favour of non-disclosure but none in favour of disclosure.

### Analysis

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11. The Commissioner will now deal with this case by considering firstly a procedural breach and secondly, the public authority's use of the section 42 exemption, including application of the public interest test. A full text of the relevant statutory provisions referred to is contained in the legal annex.

## Procedural matters

12. Section 17(1) of the Act provides that where a public authority is relying upon an exemption it must let the applicant know within the time for compliance with section 1(1) and explain what exemption(s) have been relied upon. Where it would not otherwise be apparent the public authority must also explain why the exemption is being relied upon.
13. Section 10(1) provides that a request should be dealt with promptly and in any event not later than 20 working days following the date of receipt. The public authority wrote to the applicant on the 20th working day following receipt, informing him that the information was exempted under section 42 of the Act. The Commissioner is of the view that the public authority has complied with the obligation placed upon it under section 17(1) with regard to the time for compliance.
14. However the Commissioner is of the view that although the public authority stated which exemption it sought to rely upon it did not state with sufficient clarity why the withheld information fell under the terms of the exemption under section 42.
15. Section 17(3)(b) of the Act requires the public authority to state the reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Commissioner is of the view that the public authority did not demonstrate proper consideration of the public interest arguments in favour of disclosure and non-disclosure of the requested information.
16. Sections 17(7)(a) and (b) of the Act requires the public authority to provide particulars of any procedure it has for dealing with complaints about the handling of requests for information and of the complainant's right to appeal under section 50 of the Act. The public authority did not provide these details.
17. Accordingly the Commissioner finds that apart from the time for compliance, the public authority has failed to meet the obligations imposed upon it by section 17 of the Act.

## Exemption

18. The section 42 exemption applied by the public authority relates to information to which a claim to legal professional privilege could be maintained. Such information is exempt information.
19. The principle of legal professional privilege can be described as a set of rules or principles designed to protect the confidentiality of legal or legally related communications and exchanges, between the client and his/her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client. It also includes exchanges between clients and third parties if such communications or exchanges come into being for the purposes of preparing litigation.

20. There are two separate categories within this privilege known as advice privilege and litigation privilege.
21. Advice privilege covers communications between a person and his/her lawyer provided they are confidential and written for the sole or dominant purpose of obtaining legal advice or assistance in relation to rights or obligations.
22. Litigation privilege arises where litigation is contemplated or underway. Where this is the case privilege attaches to all documents, reports, information, evidence and the like obtained for the sole or dominant purpose of proposed or on-going litigation. This includes communications between a professional legal adviser and her/his client, communications with third parties made for the purpose of assisting the client's case for example expert opinion and may cover a variety of documents.
23. The Commissioner has seen the exempted information. He is satisfied that it constitutes legal advice and therefore attracts advice privilege, as information was disclosed by the Trustees to the solicitors on a confidential basis for the sole purpose of obtaining legal advice.
24. The legal professional privilege exemption is class based which means it is not necessary to demonstrate that any prejudice may occur to the professional legal adviser/client relationship if information is disclosed. Instead it is already assumed that the disclosure of any information might undermine the relationship of the lawyer and client.
25. As this exemption is also a qualified exemption, section 2 of the Act requires the Commissioner to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
26. Although the public authority failed to provide any details of its consideration of the public interest test to the complainant, it subsequently provided an explanation to the Commissioner in response to a question put by him. It argued that there was a strong public interest in the proper administration of justice and that the courts have consistently affirmed this, rejecting anything which would make a client hold back from giving full information to their lawyer, which in turn would adversely affect the lawyer's ability to represent them effectively. It did not provide the Commissioner with any arguments in favour of disclosure.
27. The Commissioner also accepts that confidentiality between lawyer and client promotes respect for the rule of law by encouraging clients to seek legal advice. It allows for full and frank exchanges between clients and their lawyers. Without confidentiality clients might fear that anything they said to their lawyers, however sensitive or potentially damaging, could be revealed. They might be deterred from seeking legal advice at all or from disclosing all the relevant material to their lawyers. In turn this could lead to advice being given that might not be as full and frank as it ought to be.

28. The Information Tribunal has also endorsed this view. In its decision in *Bellamy v Information Commissioner* (appeal no: EA/2005/0023, FS006313) the Tribunal stated in paragraph 35 that: “... *there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest ... It may well be that ... where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight ... Nonetheless, it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case*”.
29. The Commissioner finds that in this case the public interest in maintaining the exemption in respect of the requested information outweighs the public interest in disclosing the legal advice.

## The Decision

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30. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- the application of the section 42 exemption.
31. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- section 17 as referred to in paragraphs 10 – 15.

## Other matters

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32. Although this does not form part of this Decision Notice the Commissioner wishes to highlight the following matter:
- The internal review carried out by the public authority was conducted by the same person who initially issued the refusal notice. In the section 45 Code of Practice Part VI (Complaints procedure) paragraph 40 provides that where a review is taking place it should be undertaken by someone senior to the person who took the original decision, where this is reasonably practicable.

## Right of Appeal

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33. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 29 day of January 2007**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### **Section 17(1) provides**

A public authority which ... is to any extent relying:

- on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or
- on a claim that information is exempt information

must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

### **Section 17(3) provides**

A public authority which ... is to any extent relying:

- on a claim that in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, or
- on a claim that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information

must either in the notice under section 17(1) or in a separate notice within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, on a claim that in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Section 17(7) provides**

A notice under subsection (1), (3) or (5) must-

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50.

**Section 42 provides**

- (1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.
- (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.